IN THE HIGH COURT OF JUDICATURE
ANDHRA PRADESH
AT HYDERABAD

THE HON'BLE ACTING CHIEF JUSTICE SRI BILAL NAZKI
AND
THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

WRIT PETITION NO :3396 of 2004

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Dated:31st December 2007.

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Between:

The Director General, Head Quarters, Border Roads Organisation, T.P.D.T.E., Seema Sadak Bhavan, Ring Road, Delhi Cantonment, New Delhi and others.

..... PETITIONERS

AND

The Commissioner of Commercial Taxes, Nampally, Hyderabad and others.

.....RESPONDENTS

THE HON'BLE ACTING CHIEF JUSTICE SRI BILAL

NAZKI
AND
THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

WRIT PETITION NO :3396 of 2004

ORAL ORDER:

(Per the Hon'ble Sri Justice Nooty Ramamohana Rao)

The petitioners are all officers belonging to and representing the Border Roads Organization (for short 'the BRO'), which is an Armed Force of the Union of India. Because of its renowned efficiency of building roads in difficult and inhospitable terrain, the State Government of Andhra Pradesh-the 5th respondent herein, accorded sanction through their G.O.Ms.No.279, T.R.& B (R-III) Department, dated 31-10-1994, for construction of a road from Damaku to Nimmalapadu from Kms. 0/0 to 22/0 at an estimated cost of Rs.12.62 Crores by the BRO. The costs of this road construction project were to be met by the Government of Andhra Pradesh and Birla Periclase Company on cost sharing basis at the ratio of 50:50. The orders of the State Government have specifically stated that this construction work has been entrusted to the BRO to get it completed quickly. The State Government has also, through the same orders, directed the money for this project to be routed through the 4th respondent-A.P.I.I.C. Limited,

which is a Government of Andhra Pradesh undertaking. In terms of the orders passed by the State Government, a memorandum of understanding has been signed by and between the BRO and the 4th respondent-A.P.I.I.C. Limited, working out the various modalities for execution of the project. Accordingly, the BRO commenced the road construction project in February 1996 and completed the same in September 1998. Since the execution of the project was undertaken not to make any profit in the process by the BRO, it had returned a sum of Rs.46,72,000/- to the 4th respondent representing the unspent amount in respect of the project.

The 3rd respondent-Commercial Tax Officer, Vizianagaram, has issued a show-cause notice to the BRO on 14-09-2000 calling upon them to pay sales tax on the turnover of Rs.8,83,40,000/- at the rate of 6% in terms of the A.P. General Sales Tax Act, 1957 (henceforth referred to as 'the Act'), treating the construction of the aforesaid project as a works contract. The BRO filed its objections to the proposed assessment contending that the BRO is not a 'dealer' indulging in works contracts and that the project in question has been executed for the State Government of Andhra Pradesh and it is executed by the funds made available by the said State and routed through the 4th respondent, which is another public sector undertaking of the State Government and, hence, disputed their liability to pay the

tax. However, the

3rd respondent finalized the assessment proceedings on 19-11-2000 holding that the BRO is a deemed seller and hence, liable to pay tax at 7% of the turnover, which worked out to Rs.61,83,800/-, though the show-cause notice issued by the 3rd respondent on

14-09-2000 has only proposed to assess the tax at 6%. Against the orders passed by the 3rd respondent assessing them to tax, an appeal is said to have been preferred on 09-03-2001, but not in the prescribed proforma by the BRO. But however, when respondents 2 and 3 have been pressurizing the BRO to pay up the assessed tax, the BRO seems to have approached the Chief Secretary to the Government of Andhra Pradesh on 11-10-2001 and appraised him of the impropriety of the Commercial Tax Department demanding the BRO to pay the sales tax for a work executed by them for no profit and for the benefit of the State Government of Andhra Pradesh. However, before the Chief Secretary to the Government of Andhra Pradesh could take a decision in the matter, the respondents 2 and 3 are understood to have initiated steps for prosecuting the officers of the BRO for non-payment of the assessed tax. The matter has once again been taken up with the Chief Secretary to the Government of Andhra Pradesh on 14-03-2002. As there was no properly presented appeal preferred against the orders passed by the 3rd respondent-Assessing

Authority, the respondents 2 and 3 started initiating coercive action against the officials of the BRO, which has prompted them to institute the present writ petition.

We have heard Sri A.Rajasekhar Reddy the learned Assistant Solicitor General of India for the petitioners and Sri Krishna Koundinya the learned Special Government Pleader for Commercial Taxes for respondent 1 to 3 and 6.

Sri A.Rajasekhar Reddy has mainly raised the following contentions:-

The decision of the 3rd respondent to notionally treat the BRO as a dealer in terms of Section 5-F of the Act is erroneous. The 2nd respondent had not examined properly and correctly as to whether the work executed by the BRO for and on behalf of the State Government of Andhra Pradesh would amount to a contract at all or not, for, the same is not backed up by any consideration, muchless, profit. He would also contend that the BRO, being an Armed Force of the Union of India, it is part of the "State" and is bound to extend the necessary help because of its expertise in construction of roads in difficult and inhospitable terrain, when one of the States of the Union proposes to utilize its services. Therefore, the works executed by "the State" shall not be looked at as acts of commercial enterprise, but should be viewed as prompted by the solitary motto of public service. He would also contend that the BRO, being an integral part

of the Union of India itself, cannot suffer any local or municipal taxation, assuming that there is involvement of transfer of property in the process of construction of the road.

Per contra, the learned Government Pleader would contend that the Act is a complete Code in itself. The 3rd respondent has been vested with the power to make an assessment and accordingly, subjected the particular works contracts to tax under the Act. If the petitioners are aggrieved by the assessment of tax made by the 3rd respondent, the appropriate course for them should have been to carry the matter in appeal in terms of Section 19 of the Act. He would also point out that there are two further avenues available; one in the form of a Revision under Section 20 of the Act; and the other being an Appeal to the Sales Tax Appellate Tribunal under Section 21 of the Act. Therefore, without exhausting any of these statutory remedies, the writ petitioners are not entitled to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

On merits, the learned Government Pleader would urge that any works contracts though executed with or without profit motto, still is liable to be treated as a works contract only and is liable to be taxed in accordance with Section 5-F of the Act and, hence, the order passed by the 3rd respondent-Assessing Authority was not liable to be faulted at all.

It will be relevant to notice as to how various expressions have been defined under the Act.

The expressions “business”, “dealer” and “works contract” have been defined under the Act in the following manner in Sections 2(bbb), 2(e) and 2(t) respectively;

> “*business includes*: any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit an whether or not any gain or profit accrues therefrom.
>
> *‘dealer’* means any person who carries son the business of buying selling supplying or distributing goods;
>
> *‘works contract’* includes any agreement for carrying out for cash or for deferred payment or for any other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property.”

The above provisions make it clear that when once any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or

manufacture, is carried out or undertaken with or without profit motto, it becomes business. Whosoever carries on such a business becomes a dealer.

But, however, a works contract is one, which is an agreement for carrying out for cash or for a deferred payment or for any other valuable consideration, the building construction or commission of any movable or immovable property. In other words, Section 2(t) of the Act has implicitly recognized the fundamental concept that stands out that there could never be a contract or agreement between the parties without consideration. Section 23 of the Indian Contracts Act has dealt with, what considerations or objectives are lawful and what are not.

Was it not said long years ago by the Supreme Court in **R.J.KAPUR v. STATE OF PUNJAB**[1], that a modern State is certainly expected to engage in all such activities necessary for promotion of social and economic welfare of it's people. Can any one dispute that certain basic infrastructural facilities like sources of safe drinking water, basic public health care, schooling and minimum necessary transportation facilities including construction of roads and culverts are the essential requirements for securing the economic welfare of the citizens of this country.

When we look at it from this angle, the contention of the learned Assistant Solicitor General that the BRO is

not liable to be deemed to have executed the works contract by constructing the road mentioned supra, for the benefit of Government of Andhra Pradesh in juxtaposition to a contract awarded for that purpose to a private agency, whose primary motto could not be the love of the country, deserves serious consideration. When we consider the fact that the BRO is an Armed Force of the Union of India and, consequently, it cannot be construed as normally carrying on any business enterprise, but liable to be construed as rendering public service. Hence, the contention canvassed by the learned Assistant Solicitor General that public service undertaken by the State cannot be deemed as a business enterprise deserves serious consideration. Let us suppose, if the State Government of Andhra Pradesh has executed and constructed this very road, it can neither be characterized as carrying on business of construction of roads nor can it be held to have executed a works contract for the benefit of the public at large, who will be the end users and ultimately beneficiaries of such a project. Such functions are liable to be treated as forming part of the basic governmental duties. After all, it is for the State, to provide for the basic infrastructure such as roads for the purpose of ultimate service to the public at large.

Though we could have expressed a final opinion in this matter, nonetheless, we have noticed the views expressed by the Supreme Court on three different occasions in somewhat similar circumstances when

public sector undertakings or governments locked their horns in unproductive litigation.

It will be important to notice as to how the Supreme Court dealt with this issue in **OIL AND NATURAL GAS COMMISSION AND ANOTHER v. COLLECTOR OF CENTRAL EXCISE**[2], **OIL AND NATURAL GAS COMMISSION AND ANOTHER v. COLLECTOR OF CENTRAL EXCISE**[3] and **CANARA BANK AND OTHER v. NATIONAL THERMAL POWER CORPORATION AND ANOTHER**.

While dealing with the case cited (1) supra, the Supreme Court observed as follows:

> " xxxxxxxxxxxxxxxx.
> xxxxxxxxxxxxxxxxxx.
>
> 3. This Court has on more than one occasion pointed out that Public Section Undertakings of Central Government and the Union of India should not fight their litigations in Court by spending money on fees of counsel, court fees, procedural expenses and wasting public time. Courts are maintained for appropriate litigations. Court's time is not to be consumed by litigations which are carried on either side at public expenses from the source. Notwithstanding these observations repeated on a number of occasions, the present cases appear to be an instance of total callousness. The letter of October 3, 1988, indicated that the Cabinet Secretary was looking into the matter. That has not

obviously been followed up. As an instance of wasting public time and energy this matter involves a principle to be examined at the highest level.

4. The Cabinet Secretary is called upon to handle this matter personally and report to this Court within four weeks as to why this litigation is being conducted when the two sides are a public sector undertaking and the Union of India. The report of the Cabinet Secretary should be supported by an affidavit of a responsible officer.

Xxxxxxxxxxxxxxxx."

While dealing with the case cited (3) supra, the case cited (2) supra has been noted, as under, in paragraph no.9 of the said case, as follows:

"9. In ONGC's case the Cabinet Secretary was shown to have taken appropriate initiative as per direction of the Court dated 11.9.1991 and reported to the Court that the dispute between the Government Department and the public sector undertaking of the Union of India had been settled. In that view of the matter no further action was taken on the petition. The Cabinet Secretary in his Report had stated:

" I would also like to state that the Government respects the views expressed by this Honourable Court and has accepted them that public undertakings of Central

> Government and the Union of India should not fight their litigation in Court by spending money on fees on counsel, court fees, procedural expenses and wasting public time. It is in this context that the Cabinet Secretary has issued instructions from time to time to all Departments of the Government of India as well as to public undertakings of the Central Government to the effect that all disputes, regardless of the type, should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government or through arbitration and recourse to litigation should be eliminated."

In the light of the Report of the Cabinet Secretary this Court directed as under:

> "We direct that the Government of India shall set up a Committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of Government

of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to Court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior Officers only should be nominated so that the Committee would function with status, control and discipline.

It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with.

The Committee shall function under the ultimate control of the Cabinet Secretary but his delegate may look after the matters. This Court would expect a quarterly report about the

functioning of this system to the furnished to the Registry beginning from 1.1.1992."

These measures have been taken by the Supreme Court with a view to see to it that one governmental organization is not pitted on the opposite side to another governmental organization, particularly, relating to money matters.

When we consider the fact that the BRO, at the instance of the State Government of Andhra Pradesh, executed the project in question, without seeking to gain anything there from, it becomes clear to us that there is an implicit recognition of inter governmental dependence amongst both of them for the benefit of common good. If the BRO is to be subjected to tax, the same is bound to percolate back to the 4th respondent, which is a State Government of Andhra Pradesh undertaking and in turn the 4th respondent who is sustaining because of the large patronage of the State Government of Andhra Pradesh, will have to seek reimbursement from the State Government itself. It literally means that the State Government of Andhra Pradesh will have to pay sales tax for itself.

To avoid any such incongruous situation and drawing inspiration from the above quoted directives of the Supreme Court, we consider it appropriate that the Chief Secretary to the Government of Andhra Pradesh

should immediately constitute a Committee headed by himself and comprising of such number of Principle Secretaries to the Government as is considered appropriate by him, like that of, Revenue, Industries and Public Enterprises, etc., and the Commissioner of Commercial Tax and one or two representatives of the BRO or any other high ranking Officer belonging to the Armed Forces of the Union of India. Such a Committee should examine this issue and take a decision within a period of six months.

It is needless to mention that the Committee shall consider the moot point raised in this writ petition and decide the matter. We are confident that the respondents of the Commercial Tax Department will not take any precipitative steps in the matter in the mean time.

With this the writ petition is disposed of, but however, without costs.

Bilal Nazki, ACJ

Nooty Ramamohana Rao, J

31st December 2007
mrk

[1] AIR 1955 sc 549 @ 554

[2] 1992 Supp(2) SCC 432

[3] 1995 Supp (4) SCC 541